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Is an expansion of banks' duties to non-customers on the horizon?

Following the Ontario Court of Appeal's 2010 decision in *Dynasty Furniture Manufacturing Ltd. v. Toronto Dominion Bank* (2010 ONCA 514), many legal observers believed that the court had closed the door on a bank's liability for negligence in the absence of actual knowledge of fraudulent activities conducted through an account of its customer.

Dynasty Furniture Manufacturing Ltd. sued Toronto-Dominion Bank in negligence, alleging that TD had actual and constructive knowledge of fraudulent dealings by a third party that caused Dynasty to lose roughly $17 million.

In 2010, Justice Wilton-Siegel struck portions of the Dynasty's pleading that alleged TD had actual or constructive knowledge of fraudulent dealings by TD customer that caused losses, on the basis that insufficient facts supported existence of duty of care (2010 ONSC 436; affirmed 2010 ONCA 514). The Court of Appeal noted that:

> …we do not find it necessary to decide whether a bank may ever be found to have a duty to a non-customer in circumstances where it does not have actual knowledge (wilful blindness or recklessness) of the fraudulent activities being conducted through an account of its customer. We leave the question of whether such a duty exists and, if so, in what circumstances, to another day.

In 2014, Dynasty successfully moved before Justice Penny to amend its Statement of Claim to reintroduce the allegations grounded in constructive knowledge. Justice Penny concluded that the amended pleading particularized the allegation based on information that was neither known nor reasonably could have been known in 2009/2010. He noted that the previous order left open the possibility that a duty could be owed to a non-customer, but that sufficient facts had not been pleaded initially to establish the basis for the duty (2014 ONSC 4933).

TD appealed. The Court of Appeal's most recent decision refused leave to appeal from that Order.

The new allegations open the possibility of a finding of a duty of care owed in circumstances where there is something less than actual knowledge of fraud. Given the policy implications, the

court is unlikely to define such a duty broadly. It remains to be seen whether the ultimate trial of this matter will provide any guidance as to the circumstances on which such a duty may rise.

- Research contributed by Rubal Bhadu, 2014/2015 articling student.